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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

Scott Jordan Armendariz,
Plaintiff,

v.

Lynn T. Hamilton,
Defendant.

No. CV 15-0729-PHX-DGC (BSB)

ORDER

Plaintiff Scott Jordan Armendariz, who is confined in the Arizona State Prison Complex-Yuma in San Luis, Arizona, has filed a *pro se* civil rights Complaint pursuant to 42 U.S.C. § 1983 (Doc. 1) and an Application to Proceed *In Forma Pauperis* (Doc. 4). The Court will dismiss this action.

I. Application to Proceed *In Forma Pauperis* and Filing Fee

Plaintiff's Application to Proceed *In Forma Pauperis* will be granted. 28 U.S.C. § 1915(a). Plaintiff must pay the statutory filing fee of \$350.00. 28 U.S.C. § 1915(b)(1). The Court will assess an initial partial filing fee of \$17.84. The remainder of the fee will be collected monthly in payments of 20% of the previous month's income credited to Plaintiff's trust account each time the amount in the account exceeds \$10.00. 28 U.S.C. § 1915(b)(2). The Court will enter a separate Order requiring the appropriate government agency to collect and forward the fees according to the statutory formula.

II. Statutory Screening of Prisoner Complaints

The Court is required to screen complaints brought by prisoners seeking relief

1 against a governmental entity or an officer or an employee of a governmental entity. 28
2 U.S.C. § 1915A(a). The Court must dismiss a complaint or portion thereof if a plaintiff
3 has raised claims that are legally frivolous or malicious, that fail to state a claim upon
4 which relief may be granted, or that seek monetary relief from a defendant who is
5 immune from such relief. 28 U.S.C. § 1915A(b)(1)–(2).

6 A pleading must contain a “short and plain statement of the claim *showing* that the
7 pleader is entitled to relief.” Fed. R. Civ. P. 8(a)(2) (emphasis added). While Rule 8
8 does not demand detailed factual allegations, “it demands more than an unadorned, the-
9 defendant-unlawfully-harmed-me accusation.” *Ashcroft v. Iqbal*, 556 U.S. 662, 678
10 (2009). “Threadbare recitals of the elements of a cause of action, supported by mere
11 conclusory statements, do not suffice.” *Id.*

12 “[A] complaint must contain sufficient factual matter, accepted as true, to ‘state a
13 claim to relief that is plausible on its face.’” *Id.* (quoting *Bell Atlantic Corp. v. Twombly*,
14 550 U.S. 544, 570 (2007)). A claim is plausible “when the plaintiff pleads factual
15 content that allows the court to draw the reasonable inference that the defendant is liable
16 for the misconduct alleged.” *Id.* “Determining whether a complaint states a plausible
17 claim for relief [is] . . . a context-specific task that requires the reviewing court to draw
18 on its judicial experience and common sense.” *Id.* at 679. Thus, although a plaintiff’s
19 specific factual allegations may be consistent with a constitutional claim, a court must
20 assess whether there are other “more likely explanations” for a defendant’s conduct. *Id.*
21 at 681.

22 But as the United States Court of Appeals for the Ninth Circuit has instructed,
23 courts must “continue to construe *pro se* filings liberally.” *Hebbe v. Pliler*, 627 F.3d 338,
24 342 (9th Cir. 2010). A “complaint [filed by a *pro se* prisoner] ‘must be held to less
25 stringent standards than formal pleadings drafted by lawyers.’” *Id.* (quoting *Erickson v.*
26 *Pardus*, 551 U.S. 89, 94 (2007) (*per curiam*)).

27 If the Court determines that a pleading could be cured by the allegation of other
28 facts, a *pro se* litigant is entitled to an opportunity to amend a complaint before dismissal

1 of the action. *See Lopez v. Smith*, 203 F.3d 1122, 1127-29 (9th Cir. 2000) (*en banc*).
 2 Plaintiff's Complaint will be dismissed for failure to state a claim, without leave to
 3 amend because the defects cannot be corrected.

4 **III. Failure to State a Claim**

5 In his Complaint, Plaintiff names Lynn T. Hamilton, his criminal defense attorney,
 6 as the sole Defendant. A prerequisite for any relief under 42 U.S.C. § 1983 is a showing
 7 that the defendant has acted under the color of state law. Whether an attorney
 8 representing a criminal defendant is a public defender, court-appointed counsel, or a
 9 privately retained attorney, he or she does not act under color of state law. *See Polk*
 10 *County v. Dodson*, 454 U.S. 312, 317-18 (1981). Therefore, Plaintiff's civil rights claims
 11 against Hamilton must fail unless Plaintiff can set out facts showing a conspiracy
 12 between his counsel and state officials to deny him the right to adequate representation
 13 under the Sixth Amendment. *See Tower v. Glover*, 467 U.S. 914, 920 (1984).

14 Moreover, Plaintiff's claim would be barred by *Heck v. Humphrey*, 512 U.S. 477,
 15 486 (1994), because violation of the Sixth Amendment right to counsel in a criminal
 16 proceeding would necessarily imply the invalidity of Plaintiff's conviction. Accordingly,
 17 Plaintiff's allegations will be dismissed for failure to state a claim. Because there are no
 18 facts Plaintiff could allege that would cure the defects described herein, the Court will
 19 dismiss the Complaint without leave to amend.

20 **IT IS ORDERED:**

21 (1) Plaintiff's Application to Proceed *In Forma Pauperis* (Doc. 4) is **granted**.

22 (2) As required by the accompanying Order to the appropriate government
 23 agency, Plaintiff must pay the \$350.00 filing fee and is assessed an initial partial filing
 24 fee of \$17.84.

25 (3) The Complaint (Doc. 1) is **dismissed** for failure to state a claim pursuant to
 26 28 U.S.C. § 1915A(b)(1), and the Clerk of Court must enter judgment accordingly.

27 (4) The Clerk of Court must make an entry on the docket stating that the
 28 dismissal for failure to state a claim may count as a "strike" under 28 U.S.C. § 1915(g).

(5) The docket shall reflect that the Court certifies, pursuant to 28 U.S.C. § 1915(a)(3) and Federal Rules of Appellate Procedure 24(a)(3)(A), that any appeal of this decision would not be taken in good faith.

Daniel G. Campbell